IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 455 OF 1998

The New India Assurance Co.
Limtied ..Appellants

versus

1. Ratansing s/o. Mangu Rathod
2. Kemabai w/o. Ratansing Rathod
3. Shantaram Dinkar Dinde ..Respondents

Mr. M. G. Barve for the Appellants.
None for the Respondents No. 1 and 2.
Mr.Amit Borkar for the Respondent No.3

CORAM : D. G. DESHPANDE,J.

DATE : 6TH MAY, 2005

ORAL ORDER :

1. Heard Mr. Barve counsel for the appellants. Respondents served, nobody is present for Respondent Nos. 1 and 2.

2. This Appeal is filed by the Insurance Company challenging the order dated 30.12.1997 passed by Civil judge, Senior Division, Ratnagiri & Ex-Officio Commissioner for Workmen Compensation, Ratnagiri.

3. Claim petition under the Workmen's

Compensation Act 1923 under Section 22 came to be filed by the original petitioners i.e. father and mother in respect of death of their son Suresh who was serving as driver with the original respondent No.1 Shantaram Dinkar Dinde.

4. On 25.4.1995 Suresh was driving the Tractor and Trailer No. MHK 8613 and MH-09/A-4869, when the vehicle came near village Khanpata at about 10 a.m. met with an accident where Suresh received severe injuries and died on the spot. The age of Suresh at that time was 28 years and he was earning Rs.1,800/- per month. The vehicle was owned by original respondent No.1 and insured with the present appellants. The Commissioner accepted the claim and contention of the petitioners and awarded Rs.1,95,219/- to be paid by the insurance company - the appellants herein and hence this Appeal.

5. Mr. Barve contended that the owner of the vehicle did not have permit to use the trailer to the tractor. He had not produced either the permit or licence inspite of notice to produce the documents. The owner was prosecuted for not having permit. Driver also had no licence or permit and therefore fixing the liability on insurance company, was an error committed by the Commissioner.

6. The Insurance company in the original claim petition was respondent no.2. The claimant No. 1 - father examined himself to prove his case and contentions. He was cross examined by the Insurance Company. Cross examination is concluded by asking five questions. None of which reflected the defences or the objections now taken. His cross examination is reproduced as under:

> *"It is not true to say that I am deposing false that the my son deceased Shivulal was serving with respondent No. 1 or that his salary was Rs.1800/- per month. I have not filed any document showing salary of my son. It is not true to say that deceased Shivulal was not holding driving licence. It is not true to say that claim made by me is exorbitant. It is not true to say that since my son was not holding a driving licence insurance company is not liable to make payment of any compensation."*

7. Owner was also examined by the claimants. He is witness No.2 Shantaram Dinde. He has stated that Suresh was his driver on the tractor and trailer. Suresh was holding a valid driving licence and tractor was insured with the present appellants. Suggestion was put to him whether Suresh was not

holding valid driving licence but that is denied. There is no question at all put to this witness to produce his permit or to suggest that he did not have any permit for the trailer or any other permit for any purpose whatsoever with reference to the tractor. It is therefore clear from cross examination of this witness, that submissions that are now being made, have no foundation. The important witnesses for the claimants were not put those questions, the insurance company did not examine any witness in support or defence and therefore the defence now raised is for the first time. In judgment para 9 the Commissioner has noted that the notice was given by the insurance company to the petitioners and respondent No.1 to produce the driving licence of Suresh. The claimants expressed their inability to produce the same on the ground that the deceased Suresh was keeping the licence with himself. The Commissioner also noted that no evidence in this regard was forthcoming from the insurance Company and this aspect was rightly considered and objection of the insurance company was rightly rejected by the lower court. There is no perversity in the findings or reasonings. The Commissioner relied upon the judgment of the Supreme Court reported in 1985 A.C.J. 397 and came to the conclusion that there was no iota of evidence to show that the deceased was not holding any valid

driving licence.

8. Further it is clear from the judgment that no submissions were made by the insurance company about owner not having permit and the only objection of the insurance company was about driving licence. Therefore this is also a new ground taken for the first time by the insurance company. No issue on that point regarding the permit was framed by the Commissioner, no opportunity was given to the claimants to prove that aspect and therefore the appellants cannot be now permitted to raise that point again. Mr. Barve relied upon the judgment of the **Supreme Court reported in 1998(8) Supreme 362 Kerala State Electricity Board and Anr. vs. Valsala K. & Anr** etc.. In that case question before the Supreme Court was whether the amendment of Section 4 and 4A of The Workmen's Compensation Act, 1923 made with effect from 15.9.1995, enhancing the amount of compensation and rate of interest, would be attracted to cases where the claims in respect of death or permanent disablement .....took place prior to 19.5.1995.

9. Mr. Barve alternatively contended that even if compensation is to be awarded, the claimants would not be entitled to compensation on the basis of the Amended Act. He contended that reliance was

placed by the Commissioner on the Judgment of Kerala High Court 1997(1) T.A.C. 835 Oriental Insurance Co. Ltd. vs. Ashokan, Mr. Barve submitted that Supreme Court in its judgment has in fact held on the basis of its own judgment in Pratap Narain Singh Deo Vs. Srinivas Sabata & Anr, that the relevant date for determination of the rate of compensation is the date of the accident and not the date of adjudication of the claim. Supreme Court also referred to the judgment of Kerala High Court in United India Assurance Company Limited vs. Alavi and held that it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the amendment made in 1995.

10. Mr. Barve pointed out that as per paragraph 11 of the Judgment, the Commissioner has held that completed age of deceased workman as on the date of occurrence i.e. 25.4.1995 was 25 years. His salary was Rs.1,800/- per month. The corresponding relevant factor is 216.91 and therefore the compensation to which he was entitled as per the calculation was Rs.86,764/-/. However, the Commissioner took a view that the workman was entitled to the benefit of the amendment and therefore Rs.1,95,219/- was awarded.

11. The Supreme Court in the judgment referred to above viz. 1999 (8) Supreme Today 362 has held that the relevant date for determination of the rate of compensation is the date of accident and not the date of adjudication and amendment enhancing the amount of compensation would not be attracted to cases where the claim in respect of death or permanent disability, resulting from an accident took place prior to 15.9.1995. Admittedly the incident in this case occurred on 25.4.1995 i.e. prior to the aforesaid date.

12. From this judgment, it is clear that compensation should have been awarded to the respondents by the lower court as in the statute book on the date of the accident and the benefit of amendment could not and should not have been given. Therefore, contention of Mr. Barve in this regard has to be accepted. Hence, the following order.

ORDER

. The appeal is partly allowed. Respondents - original claimants will be entitled to compensation of Rs.86,764/- instead of Rs.1,95,219/- together with interest as awarded by the Commissioner. No order as to costs.

6.5.2005 (D.G. DESHPANDE, J.)

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